Supreme Court, U.S.
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No. 02-120

IN THE

Supreme Court of the United States

GARY MILLBROOK,

Petitioner,

v.

IBP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. The Decision of The Seventh Circuit Is In Conflict With Decisions of This Court

The parties are essentially in agreement regarding the nature of the legal standard adopted by the Seventh Circuit. Respondent correctly describes the decision of the court of appeals as follows:

> The primary holding of the court below is that, since Petitioner did not present evidence of qualifications that were so clearly superior to those of Harris . . . that *no reasonable person* could have believed the latter to be the superior candidate, Petitioner did not present "sufficient evidence" to permit a finding that IBP's statement that it believed Harris to be the better candidate was false.

(Br. Opp. 15-16) (Emphasis added). This is consistent with petitioner's contention that under the standard in question a plaintiff is obligated to show that an employer's proffered explanation is so implausible that it would fail the rational basis test. (Petition 15-16)[1].

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1. Within the last month the decision in this case has been described in similar terms.

> *Millbrook* stands for the proposition that a failure-to-promote claim which is based on the employer's comparison of the plaintiff's credentials and the credentials of another candidate is doomed to defeat, unless the plaintiff can show that her credentials are so superior to those of the person eventually selected as to render the promotion decision *unfathomable* unless the decision maker resorted to some criterion outside of the candidates' respective credentials.

(Cont'd)

Respondent also is correct when it characterizes the decision below as holding that proof of a plaintiff's superior qualifications which fails to meet the Seventh Circuit's demanding standard is simply devoid of evidentiary significance.

> In the instant case, the Seventh Circuit . . . ruled that Petitioner's comparative-qualifications evidence was lacking in probative value. . . .

(Br. Opp. 16; see Petition 14)[2].

The parties emphatically are in disagreement about the practical significance of the stringent standard utilized by the Seventh and as well as the First, Second, Fifth and Eleventh Circuits. Petitioner contends that the standard is so severe that it is virtually impossible to satisfy, and that the standard thus effectively bars plaintiffs from relying on evidence of comparative qualifications. (Petition 24). Respondent disagrees. (Br. Opp. 19). That issue is of controlling importance, since this Court as well as the Third, Eighth and Ninth Circuits have repeatedly held that evidence of differences in qualifications *can* be relied on to prove discrimination.

Actual experience with the standard endorsed by the Seventh, First, Second, Fifth and Eleventh Circuits is undisputed and dispositive. The petition sets forth 63 cases

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(Cont'd)
Myles v. City of Indianapolis, 2002 WL 1800352 *4 (S.D.Ind.) (July 31, 2002) (Emphasis added).

2. Although petitioner disagrees in several respects with respondent's characterization of the evidence in this case, those differences do not bear on the appropriateness of a grant of certiorari in this case.

since 1993 in which the standard in this case has been applied in the lower courts. Since the filing of the petition three additional such cases have been reported[3]. In 65 of these 66 cases the lower court concluded, as in the instant case, that the differences in comparative qualifications had no probative value because they were not sufficiently extreme and undisputed to meet that legal standard. (Petition 45a-51a). In the six years since a single isolated 1996 *district* court opinion[4], there is among the succeeding 62 decisions not one instance in which a plaintiff's evidence was deemed sufficient to meet that standard. No court of appeals applying that standard has *ever* found that it was satisfied. Respondent does not dispute the accuracy of the list of cases set forth in the petition, and does not contend that there is more than a single case in which any lower court has ever concluded that the standard at issue in this case had been met[5].

Employers invariably defend cases alleging discrimination in promotion and hiring by asserting that the plaintiff was less qualified than the successful applicant. This Court

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3. *LeBlanc v. The TJX Companies, Inc.*, 2002 WL 1787953 *7 (M.D. Fla.) (July 16, 2002); *Myles v. City of Indianapolis*, 2002 WL 1800352 *4 (S.D.Ind.) (July 31, 2002); *Daniels v. Home Depot, Inc.*, 2002 WL 1398643 *10 (E.D.La.) (June 26, 2002).

4. *Dudley v. Wal-Mart Stores*, 931 F. Supp. 773, 805-06 (M.D. Ala. 1996).

5. Respondent objects that the petition does not "purport to have surveyed all of the employment discrimination cases that have gone to judgment since 1964." (Br. Opp. 25 n.16). But the issue here is what has occurred in decisions applying the restrictive standard endorsed by the Fifth, Seventh, Tenth and Eleventh Circuits. We emphatically do purport to have surveyed all of those cases, and respondent does not contend that our survey is either incomplete or inaccurate.

has repeatedly held that in such cases a plaintiff may seek to prove pretext by showing that he or she was in fact better qualified than the individual who was hired or promoted. *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1980); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Those decisions are obviously inconsistent with a standard under which such evidence regarding comparative qualifications is virtually always "lacking in probative value." (Br. Opp. 16).

The decisions of this Court, of course, do not permit a jury to return a verdict for a civil rights plaintiff merely because the jury believes that the employer promoted a less qualified candidate; the trier of fact must also find that the promotion decision was in fact motivated by race. In the instant case the trial judge specifically explained that distinction to the jury[6], and respondent has never questioned the adequacy of that instruction.

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6. You are not to substitute your judgment for IBP's business judgment, or decide this case upon what you would have done. It is not your job to decide whether IBP's decisions with respect to Plaintiff's employment, or the reasons IBP has given for making those decisions, were good or bad, or right or wrong, or fair or unfair. You may not find for plaintiff simply because you disagree with IBP's decisions or with IBP's reasons for its decisions. An employer has the right to take those steps which it feels necessary to run its business, so long as it does not discriminate or retaliate.

Jury Instructions, p. 18.

II. The Decision of the Seventh Circuit Conflicts With Decisions of the Third, Eighth, Ninth and District of Columbia Circuits

Equally unavailing are respondent's efforts to reconcile the decision of the Seventh Circuit with decisions in the Eighth, Ninth and Third Circuits. In the Eighth Circuit, evidence regarding qualifications is probative unless it reveals only that the two applicants in question were "similarly qualified." *Chock v. Northwest Airlines*, 113 F.3d 861, 864 (8th Cir. 1997). The *Chock* standard is obviously very different than the Seventh Circuit's rule that evidence of *dis*similar qualifications is not probative, except where those differences are both (a) undisputed and (b) so extreme that no reasonable employer could have believed the plaintiff was the lesser qualified candidate. The *Chock* standard was easily satisfied in the instant case; had this case originated in the Eighth Circuit, the jury verdict would assuredly have been upheld.

The Ninth Circuit decision in *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602 (9th Cir. 1993), holds that the trier of fact should give less weight to differences in qualifications "[t]he closer the qualifications of the candidates."[7] That holding is in two respects inconsistent with the Seventh Circuit standard. First, under the decision below the trier of fact ordinarily cannot give *any* weight to differences in qualifications, because such differences can almost never meet the Seventh Circuit's stringent standard. Second, under the Seventh Circuit standard there could never be occasion to give different (and in some instances lesser) weight to qualification disparities, because such disparities are deemed probative only when they are so great as to be conclusive.

7. In *Odima* the trier of fact was the district judge, so the opinion refers to the weight which the court should give to such evidence.

Respondent suggests that in the Third Circuit decision in *Seman v. Coplay Cement Co.*, 26 F.3d 428 (3d Cir. 1994), the evidence "*may well* have reflected such a significant disparity in qualifications as to pass muster under the Seventh Circuit's standard." (Br. Opp. 22). But in practice only 1 case out of 66 has ever met that standard; respondent's speculation that the facts in *Seman* "may well" have been such a rare case is palpably groundless. To the contrary, a decade of actual experience demonstrates that there is virtually no possibility that the evidence in *Seman* or any other case can ever satisfy that standard.

Respondent suggests that the opinion below is consistent with the 1996 decision of the District of Columbia Circuit in *Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180 (D.C.Cir. 1996). (Br. Opp. 17). But the standard utilized in the District of Columbia Circuit has since been modified by the en banc decision in *Aka v. Washington Hosp. Center*, 156 F.3d 1284 (D.C.Cir. 1998) (en banc)[8]. Under the Seventh Circuit standard an inference of discrimination can be drawn only if "there can be no dispute among persons of impartial judgment" that the plaintiff was clearly better qualified (Pet. 20a), i.e. only if any reasonable jury *must* conclude that the plaintiff was far better qualified. Under *Aka*, on the other hand, an inference of discrimination can be drawn even if there *is* a good faith dispute about the comparative qualifications, so long as the jury "*could*" find that the plaintiff's qualifications were significantly greater. *Aka*, 156 F.3d at 1294 (inference permissible "[i]f a factfinder *can* conclude" plaintiff was significantly better qualified) (emphasis added), 1297 (jury verdict affirmed because "[a] reasonable juror *could* conclude that" plaintiff was more

8. Two of the panel members in *Fischbach* dissented in *Aka*, Judges Silberman and Ginsburg.

knowledgeable; "a reasonable juror *could* therefore find" that plaintiff was significantly more qualified") (emphasis added), 1298 (inference of discrimination permissible "in cases where a jury *could* reasonably find" the plaintiff was significantly more qualified) (emphasis added). *Aka* permits an inference of discrimination under circumstances in which the decision below would preclude drawing any such conclusion.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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